1450

No. 122.

Office Supreme Court U.S.
FILED
DEC 4 1900
JAMES H. MCKENNEY,

Brf. of Atty. Gen'l (Ark.) for Appellee.

Filed Dec. 4, 1900.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE STATE OF ARKANSAS AND JOHN A. Hinkle, as sheriff of Independence County, Arkansas, appellants,
v.
CHARLES A. M. SCHLIERHOLZ, APPELLEE.

No. 122.

BRIEF FOR APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE STATE OF ARKANSAS AND JOHN A. HINKLE, as sheriff of Independence County, Arkansas, appellants, *v.* CHARLES A. M. SCHLIERHOLZ, APPELLEE. } No. 122.

BRIEF FOR APPELLEE.

STATEMENT.

This is an appeal from the judgment of the district court of the United States for the eastern district of Arkansas, rendered in a habeas corpus proceeding, discharging the appellee from the custody of the sheriff of Independence County, Ark. Schlierholz, the appellee, a special agent of the General Land Office of the United States, was sent by his superior to Arkansas to investigate and suppress timber depredations on the public lands. In the discharge of his duty, acting under instructions, he

seized and branded with the letters "U. S." certain timber in rafts on the White River, in Independence County, Ark., which he believed had been unlawfully cut from land of the United States. For this he was indicted by the local State court in two indictments, one charging him with unlawfully seizing, and the other with unlawfully branding, the timber, in violation of the Arkansas statute. Taken into custody by the sheriff, Schlierholz applied to the United States district judge for a writ of habeas corpus, alleging that he had seized and branded the timber as a special agent of the General Land Office in the discharge of his duty as such, and under instructions from his superior. The writ was issued, the sheriff made return of the warrants under the State indictments as his authority for holding Schlierholz, while the prosecuting attorney, on behalf of the State of Arkansas, filed a response alleging that Schlierholz, in seizing and branding the timber, misconceived his duties as special agent and acted outside of his instructions and contrary to the laws of the United States and the rules of any Department thereof (R., p. 5).

The case was heard in the district court of the United States, and the following judgment discharging Schlierholz from the custody of the sheriff was rendered (R., p. 9):

> Now, on this day, comes John A. Hinkle, sheriff of Independence County, and on his motion this cause is ordered to be transferred to the district court of the United States for the northern division of the eastern district of Arkansas; and thereupon came said sheriff and State of Arkansas, by S. D. Campbell, esq., State's attorney, and file a response to the petition herein; and thereupon this cause

came on for hearing, both parties being ready, and the court, having heard the evidence, finds that the said petitioner, Charles A. M. Schlierholz, *was in the performance of his duties as a special agent of the General Land Office of the United States, and the actions charged in the said indictments set out in the response were performed by him as such officer and in strict conformity with the rules and regulations of the Secretary of the Interior of the United States*, and that his detention and arrest by the sheriff of Independence County, State of Arkansas, was illegal and void.

It is therefore ordered and adjudged by the court that the said Charles A. M. Schlierholz be discharged from the custody of said sheriff under the writ in the petition and response set out and go hence without day.

And at the request of the attorney for the State thirty days' time is granted for a bill of exceptions.

The bill of exceptions contains the following agreed statement of facts (R., pp. 10 and 11):

The petitioner was indicted by the grand jury of the Independence County circuit court at the spring term, 1899, in two cases, two copies of which are filed with the response of the sheriff and the State; that the petitioner, Charles A. M. Schlierholz, at the time he made the seizures and branded the same with the brand of the United States, *was a special agent of the General Land Office* of the United States, duly commissioned as prescribed by law; that he is a resident and citizen of the State of Missouri, and was sent to the State of Arkansas by his superior officer, the Commissioner of the General Land Office, with instructions and directions to investigate certain alleged trespasses

committed in the State of Arkansas on the public domain by parties cutting unlawfully timber from lands belonging to the United States; that he had instructions which were furnished him by the Department of the Interior and which had been prepared by the Commissioner of the General Land Office and approved by the Secretary of the Interior of the United States, which were the following:

"That any special agent is directed *to seize any timber cut and taken away from the lands of the United States* wherever it may be found and — whosoever possession it may be found. That whenever any special agent finds any timber in the possession of any person which *he is satisfied from an investigation made by him has been unlawfully cut from the lands of the United States he shall seize the same* from any person in the possession of the same wheresoever found *and brand the same as the property of the United States with the brand 'U. S.,' provided that the party in possession of the same does not resist such seizure* or same does not cause a breach of the peace, but if the party in whose possession it is resists such seizure or it is likely to cause a breach of the peace he shall cause the attorney of the United States for the district to institute legal proceedings for the seizure or recovery of such timber, and any timber thus seized by the Land Department, through its officers or special agents, may be disposed of by that Department in such manner as it may determine."

That the Department furnished to the said Schlierholz a branding iron with the letters "U. S." on it; that the timber seized and branded, for which acts these indictments were found, was at the time in the possession of the persons whose names are indorsed as witnesses on the indictments and was seized by the said Schlierholz

while he was acting as such special agent of the General Land Office *without resistance on the part of the persons in whose possession he found it,* but was seized over and notwithstanding their protest, they at the time claiming ownership of the said timber; *that at the time the said seizures were made the said Schlierholz believed that the said timber had been unlawfully cut from the public domain; that he reported the seizures immediately to the General Land Office, and his actions were approved by the Commissioner.*

That at the time said seizures were made and the timber branded he had no writ or process from any court, but acted with no authority other than the directions and rules and regulations of the General Land Office of the United States, as hereinbefore recited.

The respondent Hinkle had the prisoner in his custody by virtue of the warrants issued by the clerk of the Independence County circuit court, Arkansas, copies of which are filed with the petition, and that said warrants were in due form of law and based on the two indictments filed with the response.

JACOB TRIEBER,
U. S. Attorney, for petitioner.
S. D. CAMPBELL,
Att'y for Respondents.

And to that part of the above statement of facts relating to the rules and regulations furnished said Schlierholz by the Commissioner of the General Land Office and the instructions and directions from said Commissioner and Department, and also to that part relating to the furnishing of the branding iron with the letters "U. S." to said Schlierholz, the respondents, State of Arkansas and Hinkle, by their attorney, on the ground that such evidence

was immaterial and irrelevant, at the time objected, and, their objections being overruled, they duly excepted thereto, which exceptions are noted of record.

The State of Arkansas and the sheriff having appealed and filed an assignment of error (R., p. 12), at their request the following questions were certified to this court (R., p. 13):

1. Whether this court has jurisdiction in the premises to discharge the petitioner, Charles A. M. Schlierholz, from the custody of John A. Hinkle, sheriff of Independence County, Arkansas, for the matters and things and under the circumstances set out in the record in this cause.

2. Whether the proper order of this court under the facts should have been to remand said petitioner to the custody of the said sheriff of Independence County, Arkansas, to be dealt with by the Independence circuit court of the State, or to discharge him from said custody.

Aside from the question of jurisdiction, which I shall first discuss, obviously the points to be considered are:

1. Was Schlierholz acting in the discharge of his duty as special agent when he seized and branded the timber?

2. If so, was the district court of the United States right in interfering to prevent his trial under indictments by a State court for acts thus done in the discharge of his duty as a United States officer?

BRIEF.

I.

JURISDICTION.

The case is here on appeal from the judgment of the district court of the United States discharging the petitioner. The orderly course in cases of this character is to go to the circuit court of appeals on the merits of the case, in which court the decision is final unless reviewed by this court on certiorari. To give this court jurisdiction the present case must be one within section 5 of the circuit court of appeals act. If jurisdiction exists, an examination of the assignment of errors shows it must be under one of the following clauses of that section:

> In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.
>
> In any case that involves the construction or application of the Constitution of the United States; in any case in which the Constitution or any law of the United States * * * is drawn in question.
>
> In any case in which the Constitution or law of the State is claimed to be in contravention of the Constitution of the United States.

Is, then, the jurisdiction of the court below in issue, or is there a constitutional question properly involved?

1. Neither prior thereto, nor in the return to the writ, nor in the response of the State of Arkansas was there any objection made to the jurisdiction of the court. The pleading of the State admitted the jurisdiction of the

court below to proceed with the case. The defense was on the merits and based entirely on the ground that the petitioner misconceived his duties and acted outside of his instructions and contrary to law. No objection having been made to its jurisdiction, of course such question was not entertained by the court nor passed upon by it. After judgment, and at the request of the appellants, the following questions were certified to this court (R., p. 13):

> (1) Whether this court has jurisdiction in the premises to discharge the petitioner, Charles A. M. Schlierholz, from the custody of John A. Hinkle, sheriff of Independence County, Arkansas, for the matters and things and under the circumstances set out in the record in this cause.
>
> (2) Whether the proper order of this court under the facts should have been to remand said petitioner to the custody of the said sheriff of Independence County, Arkansas, to be dealt with by the Independence circuit court of the State, or to discharge him from said custody.

This is not a certification of the question of jurisdiction contemplated by section 5 of the Circuit Court of Appeals act. There is no certification of the "question of jurisdiction alone." The right of the lower court, as a matter of law, to entertain the case at all is not disputed, but rather the question is raised whether the court in its judgment properly decided the case. In *Chappell* v. *United States* (160 U. S., 507), this court said:

> In order to bring a case within the first class, not only must it appear of record that a question of jurisdiction was involved in the decision below, but that question, and that alone, must be certified to this court.

The appellants chose to go to hearing upon the merits of the case after having admitted by the pleadings the jurisdiction of the court to proceed. There is no question as to the right of a court of the United States under sections 751 and 753 of the Revised Statutes to issue a writ of habeas corpus upon petition of an officer of the United States held in custody because of the performance of his official duties. While, of course, this court may at any stage notice a plain error of law, whether assigned or not, it is submitted that there is no question in the present case as to the jurisdiction of the lower court, and that appellants have waived their right to come here on that question alone.

2. It is submitted also that there is not before this court any constitutional question. No such question was raised in the lower court nor passed upon by it. In the assignment of errors the so-called constitutional questions were raised for the first time.

The Chief Justice, speaking for the court in *Ansbro* v. *United States* (159 U. S., 695, 697), said:

> The jurisdiction of this court must be maintained then, if at all, on the ground that this is a case "that involves the construction or application of the Constitution of the United States," or "in which the constitutionality of any law of the United States is drawn in question." But we can not find that any constitutional question was raised at the trial. Motions to quash, to instruct the jury to find for the defendant, for new trial, and in arrest of judgment were made, but in neither of them, so far as appears, nor by any exception to rulings on the admission or exclusion of evidence, nor to instructions given or

the refusal of instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional. The first time that anything appears upon that subject is in the assignment of errors, filed February 13, 1895.

A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument; but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. (*Borgemeyer* v. *Idler*, 159 U. S., 408; *Carey* v. *Railway Company*, 150 U. S., 170; *In re Lennon*, 150 U. S., 395; *Northern Pacific Railroad Company* v. *Amato*, 144 U. S., 465, 472; *Sayward* v. *Denny*, 158 U. S., 180.) An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891.

See also *Cornell* v. *Green*, 163 U. S., 79; *Muse* v. *Arlington Hotel Company*, 168 U. S., 435; *Carey* v. *Houston and Texas Central Railway*, 150 U. S., 170, 181.

No definite issue was made in this case nor question raised as to the application of the Constitution or claim made that any provision thereof had been violated by petitioner, and no such point was decided by the court. It is submitted, therefore, that no constitutional question

having been presented to or passed upon by the court below, such question can not now be raised after judgment in order to vest this court with jurisdiction.

II.

SCHLIERHOLZ WAS IN THE DISCHARGE OF HIS DUTY.

Coming to the merits, the primary question is whether Schlierholz was acting in the discharge of his duty as special agent of the General Land Office of the United States when he seized and branded the timber. In his application for the writ he alleged he was (R., p. 1). The State of Arkansas denied this, insisting he had misconceived his duty and acted outside of his instructions and contrary to the laws of the United States (R., p. 5). The lower court, after hearing on evidence, found that he—

> was in the performance of his duties as a special agent of the General Land Office of the United States, and the actions charged in the said indictments set out in the response were performed by him as such officer and in strict conformity with the rules and regulations of the Secretary of the Interior of the United States (R., p. 9).

The agreed statement of facts concedes that at the time Schlierholz made the seizures and branded the timber with the brand of the United States he was a special agent of the General Land Office and was sent to Arkansas by the Commissioner of the General Land Office, with instructions and directions to investigate certain timber depredations; that among the instructions furnished him by the Commissioner of the General Land

Office and approved by the Secretary of the Interior were the following:

> That any special agent is directed to seize any timber cut and taken away from the lands of the United States wherever it may be found and in whosesoever possession it may be found.
>
> That whenever any special agent finds any timber in the possession of any person which he is satisfied from an investigation made by him has been unlawfully cut from the lands of the United States he shall seize the same from any person in the possession of the same wheresoever found and brand the same as the property of the United States with the brand "U. S.," provided that the party in possession of the same does not resist such seizure or same does not cause a breach of the peace.

The court will observe that these instructions make it the sworn duty of the special agent to seize any timber which he is satisfied has been unlawfully cut from the lands of the United States, and to brand the same with the brand "U. S.," provided the party in possession of the timber does not resist the seizure, and the same does not cause a breach of the peace. If resistance is made and a breach of the peace threatened, then it is the duty of the special agent to call upon the United States attorney to institute legal proceedings for the seizure and recovery of the timber.

It is conceded in the agreed statement that Schlierholz seized the timber in question "without resistance on the part of the persons in whose possession he found it," although over their protest, and that Schlierholz "believed that the said timber had been unlawfully cut

from the public domain; and that he reported the seizures immediately to the General Land Office, and his actions were approved by the Commissioner" (R., p. 10).

It is admitted that Schlierholz "believed"—that is to say, was "satisfied"—that the timber had been unlawfully cut from lands of the United States. The parties in possession made no resistance to its seizure. It therefore became his plain duty, under his oath and the instructions of his superior, to seize the timber and brand it as the property of the United States. This was all he did.

The only escape from the conclusion that Schlierholz was acting in the performance of his duty as special agent in seizing and branding the timber is to insist that the instructions of his Department, which are set forth in the agreed statement of facts, are unwarranted by law; in other words, that the Government of the United States has no right to make seizure of what it believes is its own timber in the possession of other persons, but must go to law in order to obtain possession of it.

The Department of the Interior, acting through the General Land Office and its special agents, has for many years asserted and exercised the authority to seize timber which it believed had been unlawfully cut from the public domain, and to dispose of such timber upon such terms as it deemed best for the public interest. The authority of the special agents of the Land Office to convey title to such timber came before this court in the case of *Wells* v. *Nickles* (104 U. S., 444), in which Mr. Justice Miller, speaking for the court, said:

> The Department of the Interior, under the idea of protecting from depredation timber on the lands

> of the Government, has gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced. In aid of this, the registers and receivers of the land offices have, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. If any authority from Congress to do this was necessary, it may be fairly inferred from appropriations made to pay for the services of these special timber agents.

Subsequently, in 1886, the Secretary of the Interior submitted to the Attorney-General the question whether the Commissioner of the General Land Office may direct the sale without advertisement of timber seized by his special agents as having been unlawfully cut from the public lands. This question was answered in the affirmative. (18 Op., p. 434.)

As preliminary to the authority to sell, the Attorney-General discusses the authority to seize, and after referring to the statutory remedies, by way of penalty and forfeitures, says (18 Op., 435):

> But these statutory remedies are not the only ones available to the Government. In *Cotton* v. *United States* (11 How., 229), it was held that the United States have a right to bring an action of trespass *quare clausum fregit* against a person for cutting and carrying away trees from the public lands. Agreeably to the doctrine of that case the United States may resort to the same civil remedies for the protection of their property which are open to any other proprietor. Thus *they may seize the timber cut*, arrest it by replevin, or recover damages in trespass for the taking and conversion (*United States* v. *Cook*, 19

Wall., 594). These are the ordinary remedies given by the common law for the recovery of personal property or its value. Seizure or recaption (which is one of them) is a remedy by the mere act of the party injured, and may be resorted to for the recovery of such property where its exertion will not endanger the public peace. (3 Black. Com., 4.)

Authority to exert this remedy in behalf of the United States must be deemed to belong to the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior, as a power included in the general duties respecting the public lands which are devolved upon him (sec. 453, Rev. Stat.). Such authority, indeed, has long been asserted and frequently exercised by the Land Department through its officers or agents, the latter acting under instructions issued by the Commissioner, with the sanction of the Secretary. Referring to this, the Supreme Court, in *Wells* v. *Nickles* (104 U. S., 447), observes: [See quotation above.]

The above holding by Acting Attorney-General Jenks was expressly approved by Attorney-General Miller (19 Op., 710, 713).

In concluding this branch of the discussion I can not do better than quote the language of the court, speaking by Mr. Justice Miller, in the famous case of *In re Neagle* (135 U. S., 1, 65):

> The United States is the owner of millions of acres of valuable public land, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are tres-

passers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of *Wells* v. *Nickles* (104 U. S., 444). That was a case in which a class of men appointed by local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the Government thus to seize the timber cut by trespassers on its lands. The court said: "The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful." But the court, notwithstanding there was no special statute for it, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the Government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the Land Office had, by the instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands.

III.

THE UNITED STATES COURT WAS RIGHT IN INTERVENING TO PROTECT THE APPELLEE.

That Schlierholz simply did his duty as an officer of the United States in seizing and branding this timber is apparent. Is it any less apparent that the lower court only did its duty in protecting him from trial and possible fine and imprisonment at the hands of the local State authorities for thus doing his duty? If the United States is powerless to protect its agents while doing its work, it had better "shut up shop and go out of business." It is a well-known fact that there are communities which have grown rich through timber depredations. It goes without saying that a special agent of the General Land Office, charged with the duty of suppressing timber depredations and punishing timber thieves, is not viewed with favor in such a locality. The fearless discharge of duty exposes him to the risk of personal insult and injury. He needs all the protection the Government can give him. If the United States can not protect him against local indictments, it ought not to send him into such a locality, for without such protection he is sure to be indicted and just as certain to be convicted.

In the case at bar it must have been apparent to the prosecuting attorney and to the grand jurors who found these indictments that Schlierholz had simply done what he believed to be his duty in seizing and branding the timber. There was no personal end on his part. There was no act within the contemplation of the Arkansas statute. What Schlierholz did was done as an

officer of the United States. He seized the timber as the property of the United States and branded it as such. This did not prevent the parties who claimed the ownership from testing in a court of law whether the timber was or was not the property of the United States. It simply identified the timber. That was the object of the branding. This timber was in rafts on the White River. If not seized and identified, those in possession would undoubtedly have put it beyond the reach of either seizure or identification by the Government. There was, therefore, no wrongful intent in what Schlierholz did, and therefore no just ground for his indictment. It is a fair presumption, therefore, that his indictment was procured for the purpose of embarrassing him in the discharge of his duty as special agent of the Government, charged with suppressing the timber depredations then going on in Arkansas, and this brings me to the power and duty of the United States, when its officer and agent is thus attacked, to throw around him the protection of that authority which under the Constitution is supreme in this country. A reference to a few of the leading cases will be sufficient.

Section 753, Revised Statutes, expressly provides that the writ of habeas corpus shall extend to a person "in custody for an act done or omitted in pursuance of a law of the United States," which, we claim, is this case.

In *ex parte Siebold* (100 U. S., 371) this court, speaking by Mr. Justice Bradley, said (395):

> We hold it to be an incontrovertible principle that the Government of the United States may, by means of physical force, exercised through its

> official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.
>
> This power to enforce its laws and to execute its functions does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other except where both can not be executed at the same time. In that case the words of the Constitution itself shows which is to yield. "This Constitution, and all laws which shall be made in pursuance thereof, * * * shall be the supreme law of the land."

In the case of *Tennessee* v. *Davis* (100 U. S., 257) this court sustained the Federal statute authorizing the removal into the United States court for trial of an indictment found in the State court against a United States revenue officer for an act done in the discharge of his duty. In this case the Federal officer had shot and killed a citizen of Tennessee. He claimed the act was done in self-defense, while in the discharge of his duty as deputy collector, in attempting to seize an illicit distillery. Respecting the authority of the United States to protect its own officer in such a case this court, speaking by Mr. Justice Strong, said (p. 262):

> As was said in *Martin* v. *Hunter* (1 Wheat., 363), "the General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and

> within the scope of their authority, those officers can be arrested and brought to trial in a State court for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the General Government is powerless to interfere at once for their protection, if their protection must be left to the action of the State court, the operations of the General Government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the Government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

I have already quoted from the opinion of Mr. Justice Miller in the case of *In re Neagle*, in which the authority of the United States, through this writ, to protect its officer was amply sustained. It is to be observed that in this case the instructions issued by the Attorney-General to the marshal to furnish a deputy who should accompany Mr. Justice Field and guard him against the threatened assault from Judge Terry and his wife, was based upon the general power of the President under the Constitution, which declares that the President "shall take care that the laws be faithfully executed." This duty is

not limited to the enforcement of acts of Congress or treaties of the United States according to their express terms, but includes the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution. The court, in language I have already quoted, refers expressly to the millions of acres of public land, much of which contains valuable timber, as a thing to be protected by the President under this general power.

In the recent case of *Ohio* v. *Thomas* (173 U. S., 276), the writ was used to protect the governor of the Soldiers' Home in Ohio from an indictment by a State court for supplying the home with oleomargarine under circumstances violative of the Ohio law. The court held that the act of the governor in serving oleomargarine was authorized by Congress, and was therefore legal, any act of the State to the contrary notwithstanding. The court refers to the cases of *Tennessee* v. *Davis, supra; Ex parte Siebold, supra; In re Loney* (134 U. S., 372); and *In re Neagle, supra*, as authority for the use of the writ to protect the Federal officer against a State indictment for acts done in the discharge of his duty. The court further says, speaking by Mr. Justice Peckham, bottom of page 284:

> One of the grounds for making such a case as this an exception to the general rule laid down in *Ex parte Royall* (117 U. S., 241); *Whitten* v. *Tomlinson* (160 U. S., 231), and *Baker* v. *Grice* (169 U. S., 284), consists in the fact that the Federal officer proceeded against in the courts of the State may,

upon conviction, be imprisoned as a means of enforcing the sentence of a fine, and thus the operations of the Federal Government might in the meantime be obstructed. This is such a case. In *Ex parte Royall*, it was stated by Mr. Justice Harlan, in naming some of the exceptions to the general rule there laid down, that "When the petitioner is in custody by State authority for an act done or omitted to be done in pursuance of a law of the United States or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign State or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government or the obligations of this country to or its relations with foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under State authority."

Obviously this applies to the case at bar. The suppression of timber depredations by the Federal authority could be greatly embarrassed, if not effectively stopped, were the special agents subjected to trial in the local State courts and possible imprisonment in the local jails for acts done by them under instructions from their superiors and in the discharge of their duties.

In this same case (*Ohio* v. *Thomas*) the court refers to the authorities cited in *In re Waite* (81 Fed. Rep.,

359). This was a case where a United States pension examiner was indicted and convicted in an Iowa court for certain acts which he claimed he had done in the proper discharge of his duty. The writ was used to discharge him from the custody of the State authorities.

In the recent case of *State* v. *Adler* (67 Ark., 469) the effect of the discharge of Schlierholz on habeas corpus by the Federal court came before the supreme court of Arkansas, which said (p. 477):

> The Supreme Court of the United States *In re Neagle* (135 U. S., 1), in construing section 753, Revised Statutes, although regarded as having gone to the very verge of legal construction, as to one feature of the case, yet, in the main, expressed the generally accepted doctrine that a Federal officer is protected while in the discharge of the duties imposed upon him by law. The general principle is doubtless the correct one, as reasoned in the case of *Davis* v. *Tennessee* (100 U. S., 257), where it is also held that where a civil suit or criminal prosecution has been commenced in the State courts against an officer of the United States for acts done in the discharge of his official duties, the cause may be removed to the proper Federal court at once, and it is held in *Ex parte Royall* (117 U. S., 241), and many other cases, that the writ of *habeas corpus* furnishes a proper remedy in cases of criminal prosecution, the Federal courts having a sound discretion to exercise the jurisdiction before or after trial of the petitioner in the state courts. This is approved in *Ohio* v. *Thomas* (173 U. S., 276). Section 752, Revised Statutes of the United States, confers jurisdiction upon the justices and judges of the United States courts, as well as upon the courts

themselves, to hear and determine petitions for writs of *habeas corpus*, and section 763 of the same chapter provides that appeals may be taken from their decisions to the circuit court of the district. The cases touching this point have greatly multiplied in recent years, but it is unnecessary to make further citations. In the case at bar, the Federal judge who heard and determined the issues made by the petition and responses thereto in the *habeas corpus* proceedings found that Schlierholz was acting in the discharge of his duty as an officer of the General Land Office of the United States when he committed the offense charged against him in the State courts, if at all. He had, therefore, substantive jurisdiction of the cause.

JOHN K. RICHARDS,
Solicitor-General.

NOVEMBER 20, 1900.

O